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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

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7 In the Matter

8

of Case No.
01-B-12974

9

10 TELIGENT, INC.,
Debtor.

11 -----x

November 19, 2003

12

13 United States Custom House
One Bowling Green
New York, New York 10004

14

15 Hearing re motion to partially vacate an order
16 authorize the assumption of a certain contract
17 with Cigna Healthcare; hearing re 9019 motion
to approve settlement with Red Cross and
Norlight

18 B E F O R E:

19

HON. STUART M. BERNSTEIN,

20

Chief Bankruptcy Judge.

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1 TELIGENT, INC.

2 A P P E A R A N C E S:

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TELIGENT, INC.

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A P P E A R A N C E S (Continued):

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1 TELIGENT, INC.

2 P R O C E E D I N G S

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4 THE COURT: Go ahead, Ms.

5 Savage. I have read all the papers.

6 MS. SAVAGE: Pardon me?

7 THE COURT: I have read all the

8 papers. Go ahead.

9 MS. SAVAGE: Which matter would

10 you like me to go forward with first, the

11 motion to vacate?

12 THE COURT: Go forward with the

13 settlement. There is only actually two

14 outstanding. I have signed the other four.

15 I just wanted a supplemental affidavit.

16 MS. SAVAGE: I have not seen the

17 order entered. I am not getting electronic

18 notice. I have notified the clerk's office.

19 THE COURT: Yes. They enter

20 the order anyway.

21 MS. SAVAGE: Thank you, Your

22 Honor. In that case we are only dealing with

23 American Red Cross and Norlight
24 Telecommunications.

25 THE COURT: Right.

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1 TELIGENT, INC.

2 MS. SAVAGE: In light of Your
3 Honor's statement at the last hearing on the
4 other four settlement motions which are Iona
5 Technical, Dell Receivable and Output
6 Technologies and C3 Communications, I felt it
7 wise to file supplemental papers on the
8 American Red Cross and the Norlight
9 Telecommunications motion that had already
10 been filed under bankruptcy Rule 9019.

11 And what I did, Your Honor, is I
12 have provided information regarding new value
13 analysis and other information.

14 THE COURT: Yes, in the future I
15 don't need that kind of detail. I just want

16 to know whether you have looked at the
17 payments, and by the way a lot of these look
18 like checks that bounced, so the payments are
19 identical so the analysis -- I just want to
20 know that you have considered these and you
21 have examined the rank and range is 30 to \$60
22 million which is more or less what the Debtor
23 was doing at the particular time. That is
24 all.

25 MS. SAVAGE: Okay, Your Honor.

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2 THE COURT: I don't want to try
3 the case. I just want to make sure you
4 considered the issue because what I got from
5 you, basically, we entered into good faith
6 negotiations and we decided to settle for X
7 amount of dollars because it saves time and
8 expense. That is true of every --

9 MS. SAVAGE: That is fine, Your
10 Honor. I understand that, and I have no
11 problem filing whatever information you need
12 to in order to make an informed decision.

13 Would you like me to make an
14 offer of proof on American Red Cross and
15 Norlight?

16 THE COURT: Yes, what is the
17 amount of debt? And then I understand checks
18 never cleared and it is actually less than you
19 sought originally.

20 MS. SAVAGE: It was not that
21 they didn't clear. They were actually voided
22 by the Debtor, so they were never negotiated.
23 With American Red Cross, we originally sued
24 for in excess of \$375,000. Thereafter, we
25 found out that a check for approximately

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2 \$350,000 had been voided. So the actual
3 total amount of the transfer was \$25,212.

4 THE COURT: What is the
5 settlement for?

6 MS. SAVAGE: The settlement is
7 70 percent of that amount --

8 THE COURT: That is approved.
9 What is the next one?

10 MS. SAVAGE: The next one is
11 Norlight. Norlight Telecommunications is a
12 little bit unusual. It is a utility
13 company. It turns out that some of the
14 payments made in the 90-day period were
15 advance payments for what turned out to be
16 postpetition use of utilities.

17 Your Honor entered a utilities
18 order relating to the payment of utility
19 bills, so accordingly I could attempt to
20 recover the funds that were paid prepetition
21 for the postpetition use of utilities because
22 Teligent was entitled to pay postpetition by
23 an order entered by this Court in one of the

24 first day orders. So, accordingly, I walk
25 away from that portion of the claim.

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2 Additionally --

3 THE COURT: So what is the real
4 amount or portion?

5 MS. SAVAGE: The real amount
6 transferred was \$73,000, but out of that
7 amount there were two advanced payments that
8 totaled in excess of \$25,000. So ultimately
9 I am recovering \$30,000 of \$49,000 that was a
10 true preferential payment as opposed to an
11 advance payment.

12 THE COURT: Why the \$19,000
13 haircut?

14 MS. SAVAGE: Because \$19,000 of
15 the funds paid were not a preferential
16 transfer. They were an advance payment for

17 the future month's use of utilities.

18 THE COURT: I thought you said
19 it was 73, but 25 plus was an advance payment,
20 right.

21 MS. SAVAGE: Well, it turns out
22 also Norlight got a void check, so that was
23 edited out of the original claim we filed.
24 Furthermore, there was so much doubling of the
25 transfers on the analysis that was given to us

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1 TELIGENT, INC.

2 by Teligent. So ultimately we --

3 THE COURT: After you eliminate
4 the Debtor's errors and you eliminate the
5 advance payments, what is left?

6 MS. SAVAGE: The true transfer
7 was \$49,000. That was truly preferential.

8 THE COURT: You are settling
9 that for 30?

10 MS. SAVAGE: Yes.

11 THE COURT: Why are you are
12 giving up the 19?

13 MS. SAVAGE: Because they have a
14 very strong ordinary course defense.

15 THE COURT: What was the range
16 of --

17 MS. SAVAGE: If I could just
18 refer back to my notes, Your Honor. I
19 apologize, Your Honor, for the number of
20 paragraphs you have to go through given the
21 other four settlements that are encompassed in
22 here.

23 THE COURT: Okay.

24 MS. SAVAGE: There was a
25 subsequent new value of \$49,941. The

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2 transfers that were made, the new value

3 encompassed the fact there was the providing
4 of utilities going forward prior to the
5 filing. Furthermore, during the preference
6 period the average transfer was made 43.7 days
7 from the advance with a mode of 42 days and a
8 standard deviation of 26.100 days.

9 THE COURT: You could submit
10 orders on that.

11 MS. SAVAGE: Yes. I have the
12 order with me.

13 THE COURT: You have to take out
14 the others.

15 MS. SAVAGE: I do them
16 separately.

17 THE COURT: Just give me the two
18 of them.

19 MS. SAVAGE: May I approach,
20 Your Honor?

21 THE COURT: Yes. I need
22 separate orders dismissing these adversaries.
23 Okay?

24 MS. SAVAGE: Yes, Your Honor.
25 We will be filing, actually probably by

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1 TELIGENT, INC.

2 Friday, a whole bunch of other stips and an
3 omnibus order encompasses these and dismisses
4 all the cases.

5 THE COURT: Okay. Move on to
6 your motion.

7 MS. SAVAGE: Okay. As this
8 Court knows, we have a motion to vacate an
9 order assuming an insurance policy by and
10 among the Teligent Debtors and Cigna
11 Healthcare. What basically transpired was we
12 were unaware their lease was assumed. We had
13 filed the adversary proceeding against Cigna's
14 excess of \$18 million. We discovered since
15 that filing some of the numbers were doubled
16 an tripled again. So the real claim is a
17 little in excess of \$5 million.

18 When we were told by Cigna's

19 counsel about the assumption, we notified
20 Cigna that we intend to make a motion to
21 vacate the assumption order, for the reasons
22 that I will set forth on the record
23 momentarily. In turn, Cigna filed their
24 motion to dismiss by Your Honor's September
25 30th deadline, I think it was under the

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2 scheduling order and we thereafter filed the
3 new motion to vacate.
4 Since filing the motion to vacate
5 we have obviously received objections from
6 reorganized Teligent and from Cigna. And one
7 of the things we discovered from reorganized
8 Teligent's discovery and from the affidavit of
9 Lou Duma (phonetic) attached to reorganized
10 Teligent's objection, it turns out that the
11 original policy that the representatives sued

12 under with respect to the claim in the
13 adversary proceeding was actually terminated
14 prior to the assumption motion.

15 THE COURT: So should I just
16 deny your motion as moot?

17 MS. SAVAGE: That is where I am
18 going with this, Your Honor. So what I did I
19 contacted Lou Duma and I have spoken with
20 Amerada Electric (phonetic) and asked them
21 about the sequence of events that occurred
22 with respect to the renewal of the initial
23 policy.

24 And as Your Honor will see and
25 you have seen these papers and you have seen

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1 TELIGENT, INC.
2 in my reply it appears that the initial policy
3 because it expired and because under both
4 Virginia law, Delaware law, Third Circuit law,

5 the Bankruptcy Court's decision in the Eastern
6 District of Virginia and also in Delaware that
7 the renewal of an insurance policy constitutes
8 a whole new contract.

9 THE COURT: How was this raised
10 though in the motion or the answer in the
11 adversary?

12 MS. SAVAGE: We have until this
13 Friday.

14 THE COURT: No. What is the
15 theory by which the assumption order justifies
16 the dismissal of the action?

17 MS. SAVAGE: Well, do you want
18 the explanation of Cigna's theory or would you
19 like them to state it because it is their
20 motion?

21 THE COURT: Tell me.

22 MS. SAVAGE: Their theory is,
23 if the contract that is at issue was
24 assumed --

25 THE COURT: There can't be a

1 TELIGENT, INC.

2 preference.

3 MS. SAVAGE: There can't be a

4 preference.

5 THE COURT: Why don't you make a

6 motion to strike the defense if you are saying

7 it is a different contract?

8 MS. SAVAGE: That is what

9 happened because they filed their motion to

10 dismiss first, and I can't indirectly or

11 collaterally attached the assumption order in

12 the adversary proceeding.

13 THE COURT: I thought a direct

14 attack would be an appeal from the order

15 assuming the contract.

16 MS. SAVAGE: Yes. Had we

17 known about it at the time and had Cigna's

18 contract actually been discussed in the

19 motion.

20 THE COURT: The Debtor knew
21 about it at the time and you are the
22 successor.

23 MS. SAVAGE: Pardon me?

24 THE COURT: The Debtor knew
25 about it and you are the successor of the

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2 Debtor.

3 MS. SAVAGE: No. It is
4 reorganized Teligent that is the successor to
5 the Debtor.

6 THE COURT: No. The Debtor's
7 rights were split in two. Certain interests
8 were given to you, the unsecured claims and
9 the reorganized includes that you could all
10 sue on the rights given to you.

11 MS. SAVAGE: I understand that,
12 Your Honor. One of the rights is to be able

13 to pursue claims on behalf of the estate, and
14 I differ from your --
15 THE COURT: Whatever rights you
16 get, you are still the successor of the
17 Debtor.
18 MS. SAVAGE: That is not
19 necessarily the case. I have a long section
20 dedicated in my reply to this issue of
21 standing and as to whether or not the Debtor
22 is the successor. And I know Cigna is
23 relying --
24 THE COURT: Let's not -- I don't
25 think I have a question that to the extent

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1 TELIGENT, INC.
2 this assumption order impairs your ability to
3 attack or recover, you may be able to make an
4 argument that it should be vacated.
5 What I question is your walking

6 away from baggage the Debtor would carry if
7 the Debtor made that motion.

8 MS. SAVAGE: What baggage would
9 that be?

10 THE COURT: Recently you had
11 knowledge of and you participated in procuring
12 the order and you are estopped from now
13 seeking to vacate that from an order you are
14 seeking or some other similar theory.

15 MS. SAVAGE: The problem is I
16 have read the case and decided with respect to
17 analyzing what a representative means under
18 1123 (b)(3) --

19 THE COURT: There is no question
20 that you are bringing the estate's claims,
21 that is all you have to bring. It comes with
22 all the warts and barnacles attached to that
23 estate claim and I know we have had had these
24 discussions in other contexts. And I don't
25 see how to avoid that because the extension of

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2 that your theory, I don't know which papers
3 said the extension of the theory is that you
4 could attack every order that I sign in the
5 case. I won't do the whole case over unless
6 you are telling me I have to do it over
7 because maybe it will put a little more money
8 into the estate --

9 MS. SAVAGE: Here is my question
10 then and by the way of example --

11 THE COURT: Isn't that what you
12 are really saying, isn't the underpinning of
13 your theory, but since a preference claim, a
14 successful preference claim will put money
15 into the estate, any order I entered into
16 this case which would act as a defense to that
17 preference claim should be vacated?

18 MS. SAVAGE: No. I don't
19 think that that is the logical end to that
20 argument.

21 THE COURT: Tell me where I draw

22 the line. I want to know that, if that is a
23 unique situation or one of a thousand orders I
24 entered.

25 MS. SAVAGE: I think it is a

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2 unique situation and I will explain why.

3 First of all, we went through the
4 docket prior to the expiration of the statute
5 of limitations and we took off every
6 settlement agreement that was entered into
7 with anyone on the docket and we examined to
8 see if that settlement agreement contained
9 general releases and most of settlement
10 agreements did contain general releases. And
11 not only that there was a very strong analysis
12 of the underlying claims that were involved
13 and what was being waived because I also
14 looked at the corresponding motion papers in

15 conjunction with the orders that Your Honor
16 entered on other types of settlements, not
17 obviously avoidance claims or settlement in
18 the case.

19 My statute of limitations has
20 expired to sue all these people who are
21 entered into those settlement agreements. It
22 is gone because I didn't file the motions
23 because I evaluated the underlying motions and
24 the orders entered by this Court to make sure
25 or certain I would not be wholly precluded,

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2 and that is that.

3 As far as assumption motions are
4 concerned, 99.9 percent of the leases assumed
5 in this case are customers. We are not suing
6 customers, we have nothing to do with that.
7 Those are customer contracts and we won't be

8 doing anything with them.

9 As far as other assumptions are
10 concerned --

11 THE COURT: Are you getting that
12 because this is an insurance company that is
13 the --

14 MS. SAVAGE: No. Well, what I
15 was going to say is the other motions that
16 were filed either other companies we have
17 settled with them that we have determined that
18 they --

19 THE COURT: No, forget about
20 settlements because you sued those people and
21 I kind of decided if they didn't decide it.
22 Tell me what makes this different from any
23 other assumption order.

24 MS. SAVAGE: What makes this
25 different, with respect to the Cigna

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2 Healthcare contract, it didn't mention the
3 Cigna Healthcare contract or the nature of the
4 contract or the underlying business
5 justification to assume the contract. The
6 motion to assume the Cigna contract only
7 specifically dealt with license agreements
8 associated with leases, site leases, things of
9 that nature. The word healthcare didn't come
10 up in the decision.

11 The discussion of whether or not
12 they could have obtained alternative
13 healthcare coverage was never mentioned.
14 The nature of the agreements was not even
15 mentioned in the motion. It was tossed in
16 there perhaps as an afterthought just to
17 toss it into what became the lease assumption
18 motion that had to be filed prior to
19 confirmation.

20 THE COURT: I understand if
21 someone had appealed that order they could
22 arguably say there was no factual basis to

23 support the application of the business
24 judgment rule. But this is not an appeal
25 from the order.

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2 What you are essentially saying
3 is the circumstances you have described are so
4 extraordinary. You haven't said the Debtor
5 was not entitled to the protection of the
6 business judgment rule or anyone breached it
7 or anything like that. That is really what
8 the bottom line is, they didn't analyze
9 to the effect of this preference claim or
10 giving up this preference claim when they went
11 through the assumption order. But the
12 business judgment law protects them against
13 negligence.

14 MS. SAVAGE: It doesn't protect
15 them retroactively. They are trying to

16 assert the business justification law a year
17 after they had a requirement to set it forth
18 in the original motion.

19 THE COURT: But they didn't set
20 it forth, as I said. But can you come back
21 under Rule 60 a year later and say this is an
22 extraordinary circumstance because I granted
23 the motion but there wasn't a factual basis
24 for granting it which is what you are saying
25 but that sounds to me like an appeal. You

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2 think you are using Rule 60 as a substitute
3 for an appeal.

4 MS. SAVAGE: With the exception
5 of the committee or the largest 20 or 30
6 creditors in this estate and the lenders no
7 other unsecured creditors were served with
8 this motion at the time. So it is not like

9 the unsecured --

10 THE COURT: The committee was
11 served?

12 MS. SAVAGE: Yes, and the
13 committee is exactly -- the committee had
14 agreed to support the plan in exchange for the
15 transfer of these preference claims, including
16 the Cigna claim. The Cigna claim was never
17 disclosed as being waived as a result of the
18 assumption --

19 THE COURT: That is not what the
20 plan says.

21 MS. SAVAGE: Pardon me?

22 THE COURT: The plan says you
23 are to get the Chapter 7 avoidance claims that
24 were not previously released or waived or
25 something like that. You want me to redo

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1 TELIGENT, INC.

2 this whole bankruptcy and that is the problem
3 I have with this whole motion.

4 MS. SAVAGE: I am not looking to
5 redo the bankruptcy. I see the Maxwell case
6 by Judge Brozman where the creditors committee
7 collaterally attacked a settlement agreement
8 which they were served with notice of but
9 because the creditors committee --

10 THE COURT: This is not a
11 settlement agreement, it is a little
12 different.

13 MS. SAVAGE: But it has the same
14 effect and, Your Honor, I have cited a number
15 of cases, Second Circuit cases. The Supreme
16 Court Court case which talks about Rule 60,
17 (b)(6) and contemplates this Court taking into
18 account errors or orders being entered in
19 error.

20 THE COURT: Can I ask you a
21 different question?

22 MS. SAVAGE: Yes.

23 THE COURT: What is the
24 practical effect of vacating an assumption

25 order?

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2 MS. SAVAGE: It is only a
3 partial vacating and only with respect to
4 Cigna and it preserves the avoidance action.

5 THE COURT: What about the
6 people who received medical benefits since
7 the assumption order? Won't they now have to
8 pay for the medical services they have
9 received?

10 MS. SAVAGE: The answer --

11 THE COURT: This is coverage.

12 MS. SAVAGE: The answer to that
13 is -- and this goes back --

14 THE COURT: And should I take
15 that into account under Rule 60(b).

16 MS. SAVAGE: Answer --

17 THE COURT: Answer that question

18 first.

19 MS. SAVAGE: I am trying to,

20 Your Honor.

21 THE COURT: It is a yes-or-no

22 answer. That is it.

23 MS. SAVAGE: It can't possibly

24 be a yes-or-no answer.

25 THE COURT: Okay.

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1 TELIGENT, INC.

2 MS. SAVAGE: The answer is

3 twofold. The first is it goes back to my

4 first argument which is I don't think that the

5 contract that was assumed was even the

6 contract that was the subject of the adversary

7 proceeding.

8 THE COURT: What if I just deny

9 this motion because I wouldn't reach that

10 issue, I wouldn't even think about this

11 issue until there is a determination that
12 the assumption order has any relevance.

13 MS. SAVAGE: If Your Honor wants
14 to dismiss this motion without prejudice
15 because there is a question as to whether it
16 is just issuable because of this other primary
17 issue that was discovered on the basis of the
18 information that I got from Teligent after we
19 filed this motion, I have no problem with
20 that.

21 THE COURT: It sounds to me like
22 an initial argument, your initial responses
23 either in opposition to their motion,
24 essentially said it may have been a factual
25 issue. I don't know. That would require a

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1 TELIGENT, INC.
2 trial. I just don't know.

3 MS. SAVAGE: I am prepared to

4 proceed with an evidentiary hearing today.

5 THE COURT: Well, I know --

6 MS. SAVAGE: On the primary
7 issue.

8 THE COURT: I am not even sure
9 this is the appropriate context. You keep on
10 making these general motions in the adversary
11 proceeding that is pending which comes up.

12 MS. SAVAGE: I didn't make the
13 first general motion. The lenders actually
14 did that. I responded to it.

15 THE COURT: That is true. What
16 is happening with that?

17 MS. SAVAGE: I have been a
18 settlement agreement and I have been so busy
19 with other contested matters in this case, but
20 we have a settlement agreement circulating.

21 THE COURT: As I understand it,
22 you are arguing in the first instance they
23 assumed a different contract than the one that
24 is affected by the preference.

25 MS. SAVAGE: That appears to be

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1 TELIGENT, INC.

2 the case, Your Honor.

3 THE COURT: All right.

4 MR. SATHY: Good morning, Your

5 Honor. Anup Sathy, from the law firm of

6 Kirkland & Ellis, on behalf of the reorganized

7 Teligent.

8 We are looking for a ruling on

9 the motion to vacate today. We think there

10 are three vital reasons why.

11 First is the existence of the

12 motion having undue harm on the employees of

13 Teligent. These are employees that are

14 fairly sophisticated.

15 THE COURT: You never answered

16 my question, Ms. Savage. So what happens if I

17 vacate? Let's say that it is the same

18 contract.

19 MS. SAVAGE: Yes.

20 THE COURT: Let's say it is the
21 same contract and I vacate, do these people
22 now have to pay?

23 Are these people who don't have
24 medical coverage and have to pay for whatever
25 medical benefits they got from this previously

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1 TELIGENT, INC.

2 assumed and rejected contract?

3 MS. SAVAGE: No, I don't think
4 that has to happen.

5 THE COURT: Why?

6 MS. SAVAGE: Because there is
7 the principle of quantum meriut. Cigna under
8 his --

9 THE COURT: Quantum meriut, they
10 get service so they have to pay it.

11 MS. SAVAGE: But the payments

12 have been made prospectively. It doesn't
13 negate the fact that Cigna probably would have
14 continued the contract anyway. There is no
15 guarantee that this contract will continue in
16 perpetuity because Cigna has the absolute
17 right to cancel this contract.

18 THE COURT: It is a different
19 thing to sign on a going forward basis there
20 is no coverage and you buy your own medical
21 coverage, which happens to all of us at one
22 time or another in different degrees, but
23 saying that the coverage you think you had and
24 you never bothered to get it, if someone went
25 to the hospital and ran up a \$100,000 medical

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1 TELIGENT, INC.
2 bill, now you are saying you have to pay it.
3 If you have \$4 million it is okay.

4 MS. SAVAGE: This contract was

5 subject to renewal again, at about the time
6 the assumption motion was ruled on. It was
7 not ruled on October 18. There was --

8 MR. SATHY: Judge, the way the
9 plan worked and this is what happened, we
10 actually filed the motion just prior to
11 confirmation an the plan provided that if
12 there was a pending motion that motion would
13 carry. That is what the plan provided.

14 THE COURT: I am not sure what
15 the code says.

16 MS. SAVAGE: But even within the
17 one month period after the filing there was a
18 subsequent renewal of this contract yet
19 again. So I question whether the contract
20 that has continued in perpetuity is the same
21 contract that was even actually subject to
22 assumption of the order because my
23 understanding in speaking with Ms. Duma,
24 examining the --

25 THE COURT: Is that an issue I

1 TELIGENT, INC.

2 could decide as a matter of law whether it was
3 the same contract?

4 MR. SATHY: It is not. And I
5 am not even sure why I am here. This is a
6 dispute --

7 THE COURT: Don't ask me.

8 MR. SATHY: This is a dispute
9 between Cigna, and the estate claims
10 representative. If she wants to allege it is
11 a separate --

12 THE COURT: Were are you here?

13 MR. SATHY: Because she is
14 moving to vacate an order that is effective on
15 50 employees of Teligent and the remaining 150
16 contracts that we have assumed. And, Your
17 Honor, this was not a throw-away motion. It
18 was very deliberate.

19 THE COURT: One of her arguments
20 is that there was no factual basis. Whether

21 or not it was an appropriate exercise of
22 business judgment motion itself doesn't set
23 forth a factual basis to assume this
24 particular contract.

25 She is saying this is an

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2 extraordinary circumstance. Maybe you should
3 have another trial on whether there is a
4 factual basis to assume the contract.

5 MR. SATHY: Your Honor, with
6 respect to the motion, the motion had a
7 121-page exhibit that listed thousands of
8 contracts that were assumed. She is right,
9 most of contracts were with customers much but
10 there were approximately 150 that were with
11 individual parties.

12 Now I am not aware that an actual
13 factual finding was made with respect to each

14 one, but we did serve this motion to the
15 lenders, to the committee, to the major
16 creditors. Everyone knew what these contracts
17 were. We did do a high level preference
18 analysis, all very unlike what she suggested
19 in her papers. And we evaluated what
20 possible claims may be --

21 THE COURT: But that is not in
22 the record. I am not saying if we went
23 through this procedure again you couldn't get
24 an order permitting the assumption of the
25 contract.

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2 MR. SATHY: That is where we
3 would wind up, Your Honor.

4 We filed an affidavit, not
5 because we needed to because she made
6 statements --

7 THE COURT: Should we do it this
8 way?

9 MS. SAVAGE: What was that, Your
10 Honor?

11 THE COURT: We will have another
12 hearing on whether or not it is an appropriate
13 exercise of business judgment to assume this
14 contract. There are a lot of competing
15 interests.

16 I am very concerned the way this
17 is going, people who have gotten the benefit
18 under this contract will be affected
19 regardless of who you think has not gotten
20 notice of this.

21 MS. SAVAGE: Well, by the same
22 token, the thousands of unsecured creditors
23 who are going to lose the ability to
24 potentially share in a recovery of Cigna also
25 didn't get the notice of the assumption of the

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2 original motion.

3 THE COURT: That one is a
4 loser. The committee did.

5 MR. SATHY: The way the plan
6 works, she was unsecured from the --

7 THE COURT: You are a successor
8 to the estate. You are not a successor to
9 the unsecured creditors.

10 MR. SATHY: And when my partner,
11 Mr. Klein (phonetic) was sitting in this Court
12 and he said that the unsecured creditors will
13 not get any recovery, it turned out to be
14 true.

15 THE COURT: A remarkable
16 statement on the first day.

17 MR. SATHY: And that was a sense
18 of where this company was, and it turned out
19 to be true. The only reason why the
20 unsecured creditors are entitled to anything
21 is because of the settlement that this Court

22 approved.

23 THE COURT: It is all the
24 lender's money anyway.

25 MR. SATHY: Absolutely all the

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1 TELIGENT, INC.

2 lenders have had a lien on these causes of
3 action anyway. They agreed as part of the
4 plan to let a certain part of the cause of
5 action go. We wind up here again and again.

6 THE COURT: So demand that she
7 not make the motion and withdraw it, give her
8 the offer and seek the sanctions.

9 MR. SATHY: We asked the Court
10 to rule on this motion. We have asked
11 this Court to rule on this motion, and Your
12 Honor --

13 THE COURT: Let me take a step
14 back. Her argument is, her first argument is

15 the contract that was assumed was a different
16 contract that generated the preference. That
17 doesn't really affect the employees who have
18 received benefits.

19 My question is, is that something
20 that could be decided as a matter of law or
21 something that has to be tried because there
22 are factual issues?

23 MR. SATHY: Your Honor, I
24 believe that is a factual issue. That is not
25 a question of law. We have our opinion as to

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2 whether or not there was one contract. We
3 have shared information with Ms. Savage.

4 THE COURT: That is a legal
5 issue? Do I just read the contracts and the
6 cases? What would the evidence show other
7 than the contract? That is all I am asking if

8 I had a hearing.

9 MR. WISLER: Jeffrey Wisler, on
10 behalf of Cigna.

11 May I address that?

12 THE COURT: Yes.

13 MR. WISLER: What the evidence
14 will show that there was one continuing policy
15 from 1998 on. What the evidence will show is
16 an agreement that under its express terms did
17 not expire. It is terminable and it also
18 expressly provides for rate renewals. It's
19 what the movant's papers suggest.

20 THE COURT: Is there a term in
21 the contract?

22 MR. WISLER: No, there is an
23 anniversary date in the contract and at the
24 anniversary date there is a provision for a
25 rate renewal, the customer Teligent if they

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2 don't like the new rates may cancel, Cigna may
3 not. Cigna may change the rates --

4 THE COURT: And Ms. Savage is
5 saying under the case law, as I understand
6 your argument, that makes it a separate
7 contract for assumption and assignment
8 purposes. Right?

9 MS. SAVAGE: That is correct,
10 Your Honor.

11 THE COURT: You agree that is
12 what the contract says.

13 All I am saying is that it sounds
14 like a legal issue which I could resolve.

15 In other words, if I had a hearing I would
16 read -- you put in the contract, I would read
17 it. There is no testimony. I assume the
18 contract is clear and then I would read her
19 case and make a decision. That is all I am
20 suggesting.

21 MR. WISLER: That is possible,
22 Your Honor. I agree with Mr. Sathy that we
23 need a decision now. What we don't want is to

24 have continuing motions by the moving party.

25 That is a new argument.

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2 THE COURT: I don't know how I
3 could vacate an order without notice to
4 employees.

5 MR. WISLER: What I am saying,
6 Your Honor, this issue may come up again and
7 again. In Superior (phonetic), the motion to
8 vacate the issue was this tangential issue,
9 Judge,, it was not an executory contract. It
10 could never have been assumed. You don't
11 address it.

12 It was a motion to assume the
13 contract, the contract was assumed, there is a
14 reliance, there is prejudice and you can't go
15 back on them.

16 THE COURT: She is saying it is

17 a different contract. I understand you are
18 saying it is the same contract, but she is
19 saying it is a different contract.

20 MR. WISLER: When faced with
21 these types of issues before, the courts in
22 Superior Court and Feldman said I am not even
23 getting to the issue of whether or it not it
24 is a true lease or an executory contract. It
25 was assumed. The Debtor's conduct is imputed

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2 to the trustee or the successor or whatever.

3 THE COURT: I don't think I have
4 any question on that one.

5 MR. WISLER: So I don't have any
6 question on it either, Your Honor. Let me
7 give you an example. One of the defenses
8 that we discussed in our memorandum is the
9 fact that all prepetition -- if there were any

10 prepetition payments due to Cigna
11 postpetition, they are authorized to be paid
12 under the original employee benefits order.
13 That is an absolute defense. So if we don't
14 address the issue of standing and estoppel
15 now, we will face this again later.

16 THE COURT: At the beginning of
17 this presentation when we were talking about
18 settlement you said there was an existing
19 order authorizing payments, and since the
20 Court had authorized payments I can't
21 challenge it.

22 What he is really saying if these
23 had not been paid within the 90 days before
24 the filing of petition, it would have been
25 paid pursuant to that order.

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2 MS. SAVAGE: I don't know. I

3 haven't seen the order. It has not been
4 raised in its papers.

5 MR. WISLER: It absolutely
6 was.

7 MS. SAVAGE: In which, their
8 original motion?

9 MR. WISLER: Yes, Your Honor, it
10 was --

11 THE COURT: In motion and in
12 their response?

13 MR. WISLER: In the response.

14 MS. SAVAGE: In your objection
15 to those papers. I'm sorry, I am thinking of
16 the motion to dismiss. I was sure we are on
17 same page.

18 MR. WISLER: I am not asking
19 Your Honor to rule. This is another instance
20 we will have to come back again and again and
21 maybe then again if we don't resolve the
22 issues of equitable estoppel and standing at
23 this point.

24 What Mr. Sathy is pointing out is

25 he has to keep coming back because those types

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2 of issues affect him and a lot of other
3 people, not just the two parties to the
4 litigation.

5 MR. SATHY: And, Your Honor,
6 just from reorganized Teligent's perspective,
7 the concern is if he starts down this road
8 there is no end because there is just --

9 THE COURT: I think you are
10 right on that.

11 MR. SATHY: All she has is a
12 potential preference claim. If Your Honor
13 recalls we had dozens and dozens of
14 stipulations with Verizon. And I see counsel
15 for Verizon here, and we waived claims against
16 Verizon and she did not sue them because she
17 is bound by the plan, and she only gets what

18 we given to her and that was the gift. If
19 she is arguing the gift was too small she
20 should have been there at the table. She
21 wasn't. The committee was.

22 THE COURT: I hear you. What I
23 would like you to supplement, I would like to
24 know the amount of claims that were paid for
25 post assumption treatment under policy. I

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2 want to know the effect this will have on
3 people, on the employees and you put in some
4 proof on that. You could put in any response
5 to that if you want.

6 MS. SAVAGE: I have to evaluate
7 that order, that postpetition order
8 authorizing prepetition benefit payments.

9 THE COURT: So you could
10 supplement your motion.

11 MS. SAVAGE: No. Well,
12 potentially, but not in terms of trying it
13 vacate it, but in terms of most of the orders
14 you had a ceiling dollar amount, how much
15 could be spent to pay the prepetition and
16 there had been a register maintained by Ernst
17 & Young demonstrating who was paid pursuant to
18 that. The question is could they have been
19 paid in any event given the ceiling on
20 order.

21 MR. WISLER: And in the cases we
22 cite it doesn't matter. For instance, in the
23 order Your Honor entered, you didn't direct
24 payment, you authorized payment. I don't
25 recall a payment, but it is irrelevant because

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2 nothing was paid under it.

3 THE COURT: But you would have

4 paid --

5 MR. WISLER: It is a reliance.

6 It is a Court approval of what was paid

7 prepetition.

8 THE COURT: She saying it if

9 there is a limitation, in other words if you

10 were authorized less than the \$4 million, then

11 arguably that portion would be preference.

12 You could provide me with a copy of the order

13 also because it is not so easy to find.

14 MR. WISLER: I have one with me.

15 THE COURT: But I would like an

16 affidavit as to the claims history and in

17 essence what the effect would be in vacating

18 the order or potential effect since people

19 have presumably gotten medical benefits. Is

20 that something that is difficult to do?

21 MR. SATHY: I am not sure --

22 THE COURT: Because I see

23 numbers bandied about in the reply, but there

24 is no evidentiary basis.

25 MR. SATHY: I suspect we will be

1 TELIGENT, INC.

2 able to do that. My opinion is it is not
3 relevant. She has to meet the burden of
4 extraordinary circumstances. The effect on
5 the other party is not a relevant
6 consideration for determining whether she is
7 she satisfied, 60(b)(6). It is her burden.
8 The effect on the other period of time it is a
9 relevant factor, but we don't need to show
10 anything.

11 THE COURT: I would like to know
12 if there were going to be people hanging out
13 there who will suddenly be liable for medical
14 benefits that they thought would be covered by
15 a policy and are not even parties to this
16 motion.

17 When can you submit that? I have
18 no idea what is involved in it.

19 There are statements in the

20 papers regarding the thousands an thousands of
21 claims that are being paid. They have to
22 come from somewhere. Where did this come
23 from.

24 MR. WISLER: The statements in
25 the papers said thousands of claims processed

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2 on an annual basis. I don't think we
3 estimated a dollar amount.

4 THE COURT: I think someone had
5 a statement and you are telling me you don't
6 know it.

7 MR. WISLER: I am not saying you
8 can't know it. I can't tell you it is easy
9 and I can tell you, having represented Cigna
10 for some time, that it is going to be a
11 difficult target, but an estimate is certainly
12 doable.

13 THE COURT: You say thousands of
14 claims of Teligent employees and their
15 dependents have been processed and paid by
16 Cigna since the entry of the assumption
17 order. So that must have been from
18 somewhere.

19 MR. WISLER: That is what I am
20 telling you, Your Honor. We did not estimate
21 a dollar amount.

22 THE COURT: You have to have
23 some history of what the average claim is or
24 something like that.

25 MR. WISLER: Yes, Your Honor.

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2 THE COURT: I just want to
3 know.

4 MS. SAVAGE: If I also may point
5 out. One of the reasons in that that Ms.

6 Mount (phonetic) month talked that the Cigna
7 policy was renewed after the insurance rate
8 was raised back in, I think it was February of
9 2002, was because of the burden of this, of so
10 many former employees on COBRA.

11 The only thing I could say to
12 that is that even if the Cigna policy were
13 terminated, under the COBRA laws, the people,
14 the COBRA people would still have a right to
15 pay, to obtain a rate, an individual rate from
16 Cigna and continue that coverage.

17 THE COURT: I am not going to
18 grant any 60(b) motion because you are asking
19 me to in the exercise of business judgment.

20 MS. SAVAGE: That is not the
21 argument.

22 THE COURT: Are you saying there
23 was not sufficient disclosure of the grounds
24 to assume this contract? You could challenge
25 that on 60(b), and if you challenge it may be

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2 all they have to do is put on their proof and
3 that will be the end.

4 MS. SAVAGE: The question is not
5 whether I could impeach their business
6 judgment, which I am not looking to do.

7 THE COURT: Sure you are.

8 MR. SATHY: That is absolutely
9 what she said in her papers.

10 THE COURT: That is what you are
11 asking me to do.

12 MS. SAVAGE: That is not what I
13 asked.

14 THE COURT: Take a look at it
15 again, and consider all these other facts and
16 the people on COBRA, it might be a hardship,
17 but for the \$4 million I may let them get a
18 COBRA policy.

19 MS. SAVAGE: No, Your Honor,
20 excuse me, in our initial motion, a motion to

21 vacate, we knew of no business justification.
22 There were no factual statements or findings
23 with respect to the assumption in the first
24 place. So we didn't sit there and impeach
25 any business judgment because there was not

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2 any business justification offered in the
3 first place.

4 THE COURT: Do you want to have
5 a trial on the appropriateness of the business
6 judgment?

7 MS. SAVAGE: I want to have a
8 hearing on the appropriateness of trying to
9 retroactively to argue business judgment when
10 it should have been argued at the time of the
11 assumption of the order and that is what our
12 position is.

13 THE COURT: I got it.

14 MR. WISLER: I completely
15 disagree with it.

16 THE COURT: When can you get the
17 information provided?

18 MR. WISLER: I will provide
19 it -- if it is available, Your Honor. And I
20 could provide it --

21 THE COURT: Can you provide it,
22 well, next week is Thanksgiving. Can you
23 provide it by the end of the month or let me
24 know it is just --

25 MS. SAVAGE: Yes, Your Honor.

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2 I could either report to you that it is
3 impossible overall, which I doubt, or
4 impossible in that time frame, or I could
5 provide it to the Court.

6 THE COURT: Okay. I will

7 reserve decision.

8 MS. SAVAGE: Can I address the
9 procedural posture of the pending motion to
10 dismiss, though, because Cigna also made their
11 motion to dismiss?

12 THE COURT: Right.

13 MS. SAVAGE: We are filing, I
14 believe actually today our objection to that
15 motion to dismiss. We are doing an omnibus
16 objection for all the objections that were on
17 before Your Honor on January 22. We are
18 incorporating by reference our motion and are
19 ready to reply here in the main case.

20 THE COURT: It would help if you
21 put it on Pacer though.

22 MS. SAVAGE: I could do it. It
23 is not a big deal. Presumably, Cigna will
24 have a right to reply now by December 15,
25 pursuant to Your Honor's scheduling order to

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2 the facts we have set forth and presumably
3 annex the order that they are relying on, that
4 postpetition first day order.

5 THE COURT: That is a real
6 simple argument as I understand it. The
7 contract is assumed. There is no preference
8 and the contract was assumed. And unless the
9 order is vacated they have a complete defense,
10 a preference action, right?

11 MS. SAVAGE: No, not if the
12 contract that was assumed is actually not the
13 contract that was in place at the time of the
14 assumption motion.

15 THE COURT: Do I have all the
16 contracts so I could read them? Do I have a
17 complete record to make that determination on
18 that motion?

19 MR. WISLER: No.

20 MR. SATHY: I suspect you do
21 not, Your Honor.

22 MR. WISLER: Our point is you

23 don't have to decide that to decide the
24 motion.

25 THE COURT: So I will decide the

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2 motion based on the existing record, if you
3 are satisfied with it. You may not like the
4 resolution of it based on this record because
5 I don't know how I am going to determine if
6 they are the same contract if I can't read the
7 contract.

8 MR. WISLER: I can provide Your
9 Honor with the contracts along with that
10 affidavit. I shouldn't say contracts.
11 There is only one contract. There are
12 multiple policies and I could provide whatever
13 Your Honor wants in that regard.

14 What I was saying is I don't
15 think Your Honor has to consider the multiple

16 contract argument for purposes of denying the
17 motion to vacate. If Your Honor disagrees I
18 respect that, but I will submit what Your
19 Honor --

20 THE COURT: I have only asked
21 for one thing and I will decide the motion
22 based on what I have.

23 MR. SATHY: One final point. I
24 know I have another motion.

25 THE COURT: And I have a judges

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2 meeting as well.

3 MR. SATHY: The reorganized
4 Teligent continues to get pulled into these
5 matters and it is a financial drain to the
6 company.

7 THE COURT: So what could I do?

8 MR. SATHY: We need a ruling,

9 guidance from the Court that what the plan
10 says is what it says.

11 THE COURT: I think what you
12 have to do is, if you think a motion is made
13 in bad faith, she is entitled to make a
14 motion, I can't say she can't make motions, if
15 you think a motion is made in bad faith, you
16 insist in accordance with Rule 9011 that she
17 withdraw it. You send her a copy of your
18 motion for sanctions.

19 MR. SATHY: That is our
20 procedure.

21 THE COURT: If she doesn't
22 withdraw it within 21 days, and I agree with
23 you that the motion has no basis in law or in
24 fact or that it is frivolous, she will have to
25 pay out of her pocket, not out of the estate's

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2 pocket. That is all. But I can't tell her
3 she can't make motions. The plan says what
4 it says. The question is what it means.

5 MR. SATHY: If we need to have a
6 hearing on that, that is fine. We think the
7 contract issue is a separate issue. If she
8 wants to argue it is a separate contract and
9 the contract is assumed and as a matter of law
10 that doesn't change the claim, She could do
11 that within the contract's language. You
12 can't enlarge or grant under the plan.

13 THE COURT: I agree, but the
14 question is what does she have.

15 MR. SATHY: It is very clear,
16 she has everything unless it was previously
17 waived or released.

18 THE COURT: I agree that the
19 representative has whatever the plan gave the
20 representative the right to do. Now, there
21 may be some collateral rights. I don't
22 know. You are not going to get that kind
23 of statement other than the obvious, it is

24 the plan, it describes the parameters of
25 the representative's powers. It is what

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2 it is.

3 MS. SAVAGE: If I may, Your
4 Honor, we have the Exhibit A and B to our
5 reply.

6 A is the policy that Teligent
7 provided, the Cigna policy. And B is a
8 series of e-mails between Cigna, the insurer,
9 the insurance broker relating to the renewal
10 of the policy. Ms. Duma is in Court today and
11 I relied on her affidavit in support of the
12 motion.

13 THE COURT: I have another
14 motion and a meeting today, so let us wrap it
15 up.

16 MS. SAVAGE: I am. And all

17 E-mails were received by Ms. Duma in the
18 course of her regular business. I know it is
19 attached to her papers.

20 MS. SAVAGE: I want to move them
21 into evidence.

22 THE COURT: This is not an
23 evidentiary hearing. If I determine that we
24 need an evidentiary hearing, I haven't heard
25 them dispute authenticity of the E-mails or

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2 whatever they are, where they say they come
3 from them.

4 MS. SAVAGE: That is fine, Your
5 Honor.

6 MR. BERGER: This will just take
7 one minute. I am the local counsel for
8 defendant Cigna.

9 We received a proposed order

10 approving immediate mediation proceedings. We
11 were never served with the motion. Having
12 seen the way these adversary proceedings and
13 these issues are going, we don't think this is
14 an appropriate matter to --

15 THE COURT: Put in opposition
16 you were never served with the motion.

17 Thank you.

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1 TELIGENT, INC.

2 C E R T I F I C A T E

3

STATE OF NEW YORK)

4

) ss.:

COUNTY OF NEW YORK)

5

6

7

I, MINDY ROTHMAN, a Shorthand

8

Reporter and Notary Public within and for

9

the State of New York, do hereby certify:

10

I reported the proceedings in the

11

within-entitled matter and that the within

12

transcript is a true record of such

13

proceedings.

14

I further certify that I am not

15

related, by blood or marriage, to any of

16

the parties in this matter and that I am

17

in no way interested in the outcome of

18

this matter.

19

IN WITNESS WHEREOF, I have hereunto

20

set my hand this 21st day of November,

21

2003.

22

23

24

MINDY ROTHMAN

25

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